

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BANDSPEED, INC.,

Plaintiff,

v.

PARROT, INC., ACER, INC.;
ACER AMERICA CORPORATION;
GARMIN INTERNATIONAL, INC.;
GARMIN USA, INC.; GN NETCOM
A/S; GN U.S., INC. A/K/A GN
NETCOM, INC.; HTC CORPORATION;
HTC AMERICA, INC.; KYOCERA
INTERNATIONAL, INC.; KYOCERA
COMMUNICATIONS, INC.; LG
ELECTRONICS, INC.; LG
ELECTRONICS U.S.A., INC.; LG
ELECTRONICS MOBILECOMM U.S.A.,
INC.; MOTOROLA SOLUTIONS, INC.
FNA MOTOROLA, INC.; MOTOROLA
MOBILITY, INC.; PLANTRONICS, INC.;
RESEARCH IN MOTION LIMITED;
RESEARCH IN MOTION
CORPORATION; TOMTOM
INTERNATIONAL B.V.; TOMTOM,
INC.; TOSHIBA CORPORATION;
TOSHIBA AMERICA INFORMATION
SYSTEMS, INC.; TOSHIBA AMERICA,
INC.; AND BLUETOOTH SIG, INC.,

Defendants.

CAUSE NO. A-11-CV-771-LY

JURY TRIAL DEMANDED

**PLAINTIFF BANDSPEED INC.'S MOTION TO STRIKE EXHIBITS 2 - 6 OF TOMTOM'S
RULE 12(c) MOTION OR, IN THE ALTERNATIVE, FOR A REASONABLE
OPPORTUNITY TO RESPOND TO SUMMARY JUDGMENT MOTION
AND REQUEST FOR EXPEDITED CONSIDERATION**

Subject to and without waiver of its right to a delay, deferral, or dismissal of TomTom's Motion to Dismiss on the Pleadings or for Summary Judgment on Bandspeed's Antitrust Claims [Doc. 1195] ("TomTom's Rule 12(c) Motion"), or other relief, under Fed. R. Civ. P. 56(d), plaintiff Bandspeed, Inc. ("Bandspeed") files this

Motion to Strike Exhibits 2 - 6 to TomTom's Rule 12(c) Motion or, in the Alternative, for a Reasonable Opportunity to Respond to Summary Judgment Motion. Bandspeed respectfully requests the Court to expedite its consideration of this Motion; to require TomTom Defendants to file any response to this Motion by May 8, 2013; and to hold a hearing, if necessary, and to grant the relief requested herein on or before May 10, 2013.

ARGUMENT

Despite the ambiguity created by the TomTom Rule 12(c) Motion's misnamed filing in PACER and its conflicting requests for relief, counsel for TomTom confirmed that "the motion [TomTom] filed (Dkt. # 1195) is a Motion for Judgment on the Pleadings pursuant to FRCP 12(c)." The Court should strike Exhibits 2 - 6 attached to TomTom's Rule 12(c) Motion because they contain materials outside of the pleadings. In the alternative, if the Court does not exclude Exhibits 2 - 6, it must treat TomTom's motion as one for summary judgment and allow Bandspeed a reasonable opportunity to present all material that is pertinent to the motion.

I. EXHIBITS 2 - 6 MAY NOT BE CONSIDERED IN A MOTION FOR JUDGMENT ON THE PLEADINGS AND SHOULD BE STRICKEN.

Ordinarily, a court evaluating a Rule 12(c) motion "must limit [its] inquiry to the facts stated in the complaint and the documents either attached to or incorporated in the complaint." *Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996). The Court may consider documents attached by a defendant to a motion to dismiss only if the documents are referred to in the plaintiff's complaint and are central to the plaintiff's claim. *Coalition for an Airline Passengers' Bill of Rights v. Delta Air Lines Inc.*, 693 F. Supp. 2d 667 (S.D. Tex. 2010). The Court may also consider judicially noticed facts.

Exhibits 2 - 6 to TomTom's Rule 12(c) should be stricken as materials outside of the pleadings. The exhibits include (1) affidavits from TomTom employees Victor

Shcherbatyuk and Peter Spours (Rule 12(c) Mot., Exs. 3 & 4, respectively); (2) interrogatory responses served by Bluetooth SIG in this litigation (*id.*, Ex. 2); (3) documents Bates-numbered BLUETOOTH084204 – BLUETOOTH084228 produced by Bluetooth SIG in this litigation (*id.*, Ex. 6); and (4) correspondence from Peter Spours to Bandspeed counsel (*id.*, Ex. 5). These materials are not referred to in Bandspeed's Complaint. Indeed, most of the materials post-date the Complaint. Discovery responses and party correspondence served after a lawsuit is filed are not materials a Court may consider when ruling on a motion for judgment on the pleadings. *See Stewart v. Transp. Workers Union of Greater New York, Local 100*, 561 F. Supp. 2d 429, 435 (S.D.N.Y. 2008). Similarly, affidavits reciting allegations not included in the Complaint should be excluded from consideration. *Honan v. Cnty. of Cottonwood*, 2003 WL 1572138 (D. Minn. 2003) (excluding affidavit from consideration of motion for judgment on the pleadings under Rule 12(c)). Accordingly, the Court should grant Bandspeed's Motion to Strike, should exclude Exhibits 2 – 6 from consideration of TomTom's Rule 12(c) Motion, and should consider the Motion solely as a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c).

II. IN THE ALTERNATIVE, IF THE COURT CONSIDERS EXHIBITS 2 - 6 AND TREATS TOMTOM'S MOTION AS ONE FOR SUMMARY JUDGMENT, BANDSPEED IS ENTITLED TO A REASONABLE OPPORTUNITY TO RESPOND WITH ALL MATERIAL PERTINENT TO THE MOTION.

If, on a motion under Fed. R. Civ. P. 12(c), “matters outside the pleadings are presented to *and not excluded by the court*” the motion is treated as one for summary judgment . . .” and the responding party “must be given a reasonable opportunity to present all the material that is pertinent to the motion.” Fed. R. Civ. P. 12(d) (emphasis added). *Accord Garcia v. Potter*, 2010 WL 2025068, at * 2 (W.D. Tex. May 18, 2010).

If the Court does not exclude Exhibits 2 – 6 of TomTom’s Rule 12(c) Motion as requested above, it must treat the motion as a motion for summary judgment and must provide Bandspeed a “reasonable opportunity” to respond “with all the material that is pertinent to the motion.” Fed. R. Civ. P. 12(d). TomTom and Bandspeed have previously agreed to (and proposed to the Court) a deadline of October 18, 2013 for filing responses to dispositive motions. (Doc. 1096-4 at 5.) As a result, TomTom cannot reasonably object to a deadline of October 18, 2013 for the filing of Bandspeed’s response to the motion for summary judgment. Such a response date is also more likely to allow Bandspeed “a reasonable opportunity to present all the material that is pertinent to the motion.” Fed. R. Civ. P. 12(d).

CONCLUSION

For the foregoing reasons, the Court should grant Bandspeed’s Motion to Strike Exhibits 2- 6 to TomTom’s Rule 12(c) Motion; should exclude Exhibits 2 – 6 from consideration of TomTom’s Rule 12(c) Motion; and should consider TomTom’s Motion solely as a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c). In the alternative, if the Court does not grant Bandspeed’s Motion to Strike, the Court should treat TomTom’s Rule 12(c) Motion as a motion for summary judgment and should allow Bandspeed until and including October 18, 2013 to respond to the motion.

Dated: May 3, 2013

Respectfully submitted,

By: /s/ Mikal C. Watts
Mikal C. Watts
State Bar No. 20981820
Christopher V. Goodpastor
State Bar No. 00791991
Linda K. Leibfarth (pro hac vice)
WATTS GUERRA LLP
811 Barton Springs Road, Suite 725
Austin, Texas 78704
Telephone: (512) 479-0500
Facsimile: (512) 479-0502
Email: mcwatts@wattsguerra.com
cgoodpastor@wattsguerra.com
lleibfarth@wattsguerra.com

Edward W. Allred
State Bar No. 50511764
Francisco Guerra, IV
State Bar No. 00797784
Mark Fassold
State Bar No. 24012609
Shalimar S. Wallis
State Bar No. 24033191
WATTS GUERRA LLP
300 Convent Street, Suite 100
San Antonio, Texas 78205
Telephone: (210) 527-0500
Facsimile: (210) 527-0501
Email: eallred@wattsguerra.com
fguerra@wattsguerra.com
mfassold@wattsguerra.com
swallis@wattsguerra.com

Andrew G. DiNovo
State Bar No. 00790594
Adam G. Price
State Bar No. 24027750
DINOVO PRICE ELLWANGER &
HARDY LLP
7000 N. MoPac Expressway, Suite 350
Telephone: (512) 539-2626
Facsimile: (512) 539-2627
Email: adinovo@dpelaw.com
aprice@dpelaw.com

Kurt M. Sauer
State Bar No. 17673700
Kevin L. Daffer
State Bar No. 05307300
DAFFER MCDANIEL, L.L.P.
901 S. Mopac Expressway
Barton Oaks Plaza Three, Ste. 310
Austin, Texas 78746
Telephone: (512) 476-1400
Facsimile: (512) 703-1250
Email: ksauer@dmtechlaw.com
kdaffer@dmtechlaw.com

**ATTORNEYS FOR PLAINTIFF
BANDSPEED, INC.**

CERTIFICATE OF CONFERENCE

I hereby certify that I conferred with counsel for TomTom Defendants, by telephone on May 1, 2013, in a good-faith attempt to resolve this matter by agreement and certify that agreement could not be reached because counsel for TomTom would not agree to withdraw Exhibits 2 – 6 to TomTom's Rule 12(c) Motion and otherwise opposes the relief sought in this motion.

/s/ Christopher V. Goodpastor
Christopher V. Goodpastor

CERTIFICATE OF SERVICE

The undersigned certifies that on May 3, 2013 the foregoing document was electronically filed under seal with the Clerk of Court using the CM/ECF system and served on counsel of record via email.

/s/ Christopher V. Goodpastor
Christopher V. Goodpastor

Charles I. Kelhoffer
John Shorb
KELHOFFER MANOLIO & FIRESTONE
9300 East Raintree Drive, Suite 120
Scottsdale, Arizona 85260
Telephone: 480-222-9100
Fax: 480-222-9106
Email: ckelhoffer@kmflawfirm.com
jshorb@kmflawfirm.com

Clyde Moody Siebman
Lawrence A Phillips
SIEBMAN REYNOLDS BURG & PHILLIPS LLP
300 N Travis St
Sherman, TX 75090-0070
Telephone: 903-870-0070
Fax: 903-870-0066
Email: clydesiebman@siebman.com
larryphillips@siebman.com

Bryan H. Burg
Stephanie R. Barnes
SIEBMAN REYNOLDS BURG & PHILLIPS LLP
4949 Hedgecoxe Rd., Suite 230
Plano, TX 75024
Telephone: 214-387-9100
Fax: 214-387-9125
Email: bryanburg@siebman.com
stephaniebarnes@siebman.com

ATTORNEYS FOR DEFENDANT BLUETOOTH SIG, INC.

Ajeet P. Pai
David B. Weaver
VINSON & ELKINS LLP
2801 Via Fortuna
Suite 100
Austin, TX 78746
Telephone: 512-542-8798
Fax: 512-236-3317
Email: apai@velaw.com
dweaver@velaw.com

Steven R. Borgman
William L. LaFuze
VINSON & ELKINS LLP
1001 Fannin St., Suite 2500
Houston, TX 77002
Telephone: 713-758-2002
Fax: 713-615-5758
Email: sborgman@velaw.com
wlaфуze@velaw.com

Dylan J. Raife
Bita Rahebi
Vincent J. Belusko
MORRISON & FOERSTER LLP
555 West Fifth Street, Suite 3500
Los Angeles, CA 90013
Telephone: 213-892-5200
Fax: 213-892-5454
Email: draife@mofo.com
brahebi@mofo.com
vbelusko@mofo.com

Bradley S. Lui
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, NW, Suite 6000
Washington, D.C. 20006
Telephone: 202-887-1500
Fax: 202-887-0763
Email: blui@mofo.com

**ATTORNEYS FOR DEFENDANTS RESEARCH IN MOTION LIMITED
AND RESEARCH IN MOTION CORPORATION**

Stephen E. McConnico
Steven J. Wingard
SCOTT, DOUGLASS & MCCONNICO
One American Center
600 Congress Avenue, 15th Floor
Austin, TX 78701
Telephone: 512-495-6300
Fax: 512-474-0731
Email: smcconnico@scottdoug.com
Swingard@scottdoug.com

Adam P. Seitz
Michelle L. Marriott
Caroline A. Bader
Erise IP, P.A.
6201 College Blvd., Suite 300
Overland Park, KS 66211
Telephone: 913-777-5600
Fax: 913-777-5601
Email: adam.seitz@eriseip.com
Michelle.marriott@eriseip.com
Carrie.bader@eriseip.com

**ATTORNEYS FOR DEFENDANTS GARMIN
INTERNATIONAL, INC. AND GARMIN USA, INC.**

Brian P. Wikner
Jason C. Fan
Kyle D. Chen
Lori R. Mason
COOLEY GODWARD KRONISH LLP
Five Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306
Telephone: 650-843-5000
Fax: 650-857-0663
Email: bwikner@cooley.com
jfan@cooley.com
kyle.chen@cooley.com
lmason@cooley.com

Heidi Keefe
Mark R. Weinstein
COOLEY GODWARD KRONISH LLP
3175 Hanover Street
Palo Alto, CA 94304-1130
Telephone: 650-843-5000
Email: hkeefe@cooley.com
mweinstein@cooley.com

Brian Craft
Eric Hugh Findlay
FINDLAY CRAFT LLP
6760 Old Jacksonville Hwy., Suite 101
Tyler, TX 75703
Telephone: 903-534-1100
Fax: 903-534-1137
Email: bcraft@findlaycraft.com
efindlay@findlaycraft.com

Thomas J. Friel
COOLEY GODWARD KRONISH LLP
101 California Street, 5th Floor
San Francisco, CA 94111
Telephone: 415-693-2162
Fax: 415-693-2222
Email: tfriel@cooley.com

**ATTORNEYS FOR DEFENDANTS HTC CORPORATION
AND HTC AMERICA, INC.**

Victor M. Felix
Anthony J. Dain
Noel Gillespie
Robin Phillips
PROCOPIO CORY HARGREAVES
& SAVITCH, LLP
525 B Street, Suite 2200
San Diego, CA 92101
Telephone: 619-238-1900
Fax: 615-235-0398
Email: victor.felix@procopio.com
Anthony.dain@procopio.com
Noel.gillespie@procopio.com
Robin.phillips@procopio.com

William B. Nash
HAYNES AND BOONE
112 East Pecan Street, Suite 1200
San Antonio, TX 78205-1540
Telephone: 210-978-7000
Fax: 210-554-0484
Email: bill.nash@haynesboone.com

**ATTORNEYS FOR DEFENDANTS KYOCERA INTERNATIONAL, INC.
AND KYOCERA COMMUNICATIONS, INC.**

David J. Healey
Wasif H. Qureshi
Brian G. Strand
FISH & RICHARDSON PC
1221 McKinney Street, Ste 2800
Houston, TX 77010
Telephone: 713-654-5300
Fax: 713-652-0109
Email: healey@fr.com
qureshi@fr.com
strand@fr.com

Michael J. McKeon
FISH & RICHARDSON PC
1425 K Street N.W., 11th Floor
Washington, D.C. 20005
Telephone: 202-783-5070
Fax: 202-283-7331
Email: mckeon@fr.com

**ATTORNEYS FOR DEFENDANTS LG ELECTRONICS, INC.,
LG ELECTRONICS U.S.A., INC., AND LG ELECTRONICS
MOBILECOMM U.S.A., INC.**

William H. Boice
Michael J. Turton
Bonnie M. Grant
KILPATRICK TOWNSEND & STOCKTON LLP
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530
Telephone: 404-815-6500
Fax: 404-815-6555
Email: bboice@kilpatricktownsend.com
mturton@kilpatricktownsend.com
bgrant@kilpatricktownsend.com

Steven D. Moore
KILPATRICK TOWNSEND & STOCKTON LLP
1001 West Fourth Street
Winston-Salem, NC 27101
Telephone: 336-607-7300
Fax: 336-607-7500
Email: smoore@kilpatricktownsend.com

Mark A. Mayfield
Mark T. Mitchell
GARDERE WYNNE SEWELL LLP
One America Center
600 Congress Avenue
Suite 3000
Austin, TX 78701
Telephone: 512-542-7000
Fax: 512-542-7315
Email: mmayfield@gardere.com
mmitchell@gardere.com

**ATTORNEYS FOR DEFENDANTS MOTOROLA MOBILITY INC.
AND MOTOROLA SOLUTIONS, INC.**

Larry F. York
Nicholas Phillip Laurent
MCGINNIS, LOCHRIDGE & KILGORE, LLP
600 Congress Avenue, Suite 2100
Austin, TX 78701
Telephone: 512-495-6075
Fax: 512-505-6381
Email: lyork@mcginnislaw.com
nlaurent@mcginnislaw.com

Brian H. Pandya
Joseph Shin
Kevin Paul Anderson
James H. Wallace, Jr.
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
Telephone: 202-719-7000
Fax: 202-719-7049
Email: bpandya@wileyrein.com
jshin@wileyrein.com
kanderson@wileyrein.com
jwallace@wileyrein.com

Colm MacKernan
ORIGIN LTD.
Twisden Works, Twisden Road
London, UK NW5 1DN
UK
Telephone: +44-20-7209-1950
Fax: +44-20-7209-0643
Email: colm.mackernan@origin.co.uk

**ATTORNEYS FOR DEFENDANTS TOMTOM
INTERNATIONAL B.V. AND TOMTOM, INC.**

Jeffrey K. Sherwood
DICKSTEIN SHAPIRO LLP
1825 Eye Street NW
Washington, D.C. 20006-5403
Telephone: 202-420-1307
Fax: 202-420-2201
Email: sherwoodj@dicksteinshapiro.com

David Philip Whittlesey
J. Rogers Williams, Jr.
ANDREWS KURTH LLP
111 Congress Avenue
Suite 1700
Austin, TX 78701
Telephone: 512-320-9200
Fax: 512-320-9292
Email: dwhittlesey@akllp.com
Rwilliams@andrewskurth.com

**ATTORNEYS FOR DEFENDANTS TOSHIBA CORPORATION,
TOSHIBA AMERICA INFORMATION SYSTEMS, INC. AND
TOSHIBA AMERICA, INC.**